A

Bestinet Sdn Bhd v GHL Epayments Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1204–07 OF 2022
HASHIM HAMZAH, LIM CHONG FONG AND AZIZUL AZMI ADNAN JJCA
22 SEPTEMBER 2023

C

Civil Procedure — Appeal — Finding of facts — Applicable test to overturn finding of facts on appeal — Whether trial judge plainly wrong to arrive at finding of facts

D

Civil Procedure — Pleadings — Point of law — Claim for breach of implied term of contract for failure to obtain approval from Bank Negara Malaysia — Whether implied terms could validly be raised in appeal given that there was no express pleading in statement of claim — Whether term 'implied term' ought to be
E *specifically pleaded in statement of claim — Whether point of law could be raised for the first time in appeal*

Contract — Implied terms — When term to be implied in contract — Claim for
F *breach of implied term of contract for failure to obtain approval from Bank Negara Malaysia — Whether 'officious bystander' and commercial or business efficacy tests were satisfied — Whether implied term existed — Whether breach of implied terms of contract established*

G Bestinet Sdn Bhd ('the appellant'), a company that operated centralized system to manage foreign worker applications into Malaysia had engaged GHL ePayments Sdn Bhd ('the respondent') to develop an e-wallet application for foreign workers. In this regard, there was no formal contract between the parties, but they had proceeded upon the basis of a quotation issued by the
H respondent. The agreed one-time fee was RM875,000 with separate annual payments for data hosting and maintenance. Prior to the filing of the present action, the appellant had paid RM371,000 to the respondent. The present action arose when the respondent failed to meet the timeline for the e-wallet application to be operational and this breach by the respondent led to the
I termination of the contract by the appellant. In addition to the claim for breach of contract, the appellant had also alleged that the respondent had misrepresented to the appellant that the respondent was an e-wallet services provider that was licensed by Bank Negara Malaysia ('BNM') and that the respondent was able to obtain the approval of BNM for the proposed e-wallet

application but in fact, the respondent had engaged a third party called MRuncit Commerce Sdn Bhd ('MRuncit') to provide the e-wallet services. In counterclaim, the respondent sought a declaration that the termination of the contract by the appellant was unlawful and claimed for loss of profits amounting to RM1,855,000. The High Court dismissed the appellant's claim and allowed part of the respondent's counterclaim amounting to RM92,750. The High Court found, inter alia, that the reason why the timeline was not met was because BNM had required certain information and documents in order to approve the increase in the e-wallet size from RM200 to RM1,500 and it was the responsibility of the appellant to provide such information and documents. When the appellant failed to fulfill such responsibility, the appellant could not then argue that the respondent had committed a breach of contract by failing to adhere to the agreed timeline. Dissatisfied with the decision, the appellant filed the present appeal. The appellant contended that it was an implied term of the contract that the respondent was responsible for obtaining BNM's approval for the increase in the wallet size from RM200 to RM1,500, and the failure by the respondent to obtain such an approval constituted a breach of the contract. The threshold issue for the court's determination was whether implied terms could validly be raised in the present appeal given that there was no express pleading in the statement of claim.

Held, dismissing the appeal with costs of RM30,000 to the respondent:

(1) The existence of an implied term was not specifically pleaded in the statement of claim. Despite this, the court was of the view that the statement of claim contained sufficient facts to support a claim for breach of contract premised upon an implied term. Whether or not the term ought to be imputed into the contract as an implied term was a question of law and thus there was no requirement for the words 'implied term' to be specified in the statement of claim (see paras 10(a), 16 & 20).

(2) Contrary to the appellant's submission, the court found that the existence of an implied term was not argued in closing submissions before the High Court. As a general rule, points of law entitling the party raising them to judgment must be made at trial, and if they were not then made, they could not be raised at the appeal stage. Despite this, the courts nonetheless had an untrammeled discretion to allow a question of law to be raised for the first time on appeal, if it was of the view that it was in the interests of justice to do so. Having carefully considered the surrounding circumstances of the case, the court was unable to discern how justice would be best served by permitting the argument on implied terms to be raised for the first time in this appeal. Even though the basic facts supporting the contention of the existence of an implied term may have been pleaded, it appeared to the court that the original plaint had not been drafted with implied terms in mind. For this reason, the appeal was dismissed by the court (see paras 10(b), 21 & 23–24).

(3) For the purposes of Malaysian law, both the 'officious bystander' and commercial or business efficacy tests must be satisfied in order for a term to be implied into a contract. In the present case, the court found that there existed an implied term that the respondent was responsible to obtain whatever regulatory approvals that were necessary for the e-wallet application to be commissioned, including the approval for the increase in the wallet size from RM200 to RM1,500. The court was satisfied that, based on the circumstances of the present case, both the 'officious bystander' and commercial or business efficacy tests had been satisfied (see paras 10(c)(i) & 35–36).

(4) In order to overturn a finding of fact on appeal, the applicable test was well-settled: it must be shown that the trial judge was plainly wrong to arrive at that finding of fact. It would simply not be enough for the court to come to a different finding. The appellant must satisfy the court that no reasonable court, similarly circumstanced, could have arrived at the finding of the trial judge based on the evidence on record. On the facts of the present case, the court found that there did not exist any justification for the court to disturb the finding of fact by the trial judge that the appellant had failed to provide the necessary documents to BNM in a timely manner, taking into consideration that there was before the court below the unrefuted oral testimony of SD4, the Director of MRuncit to the effect that he had informed the appellant of BNM's requirements. The court therefore agreed with the finding of the trial judge that the appellant had not established that the respondent had breached its obligations under the implied term (see paras 10(c)(ii), 38–39 & 45).

[Bahasa Malaysia summary

Bestinet Sdn Bhd ('perayu'), sebuah syarikat yang mengendalikan sistem berpusat untuk mengurus permohonan pekerja asing ke Malaysia telah menghubungi GHL ePayments Sdn Bhd ('responden') untuk membangunkan aplikasi e-dompet untuk pekerja asing. Dalam hal ini, tiada kontrak rasmi antara pihak-pihak ditandatangani, tetapi mereka telah meneruskan transaksi berdasarkan sebut harga yang dikeluarkan oleh responden. Yuran sekaligus yang dipersetujui ialah RM875,000 dengan bayaran tahunan berasingan untuk pengehosan dan penyelenggaraan data. Sebelum tindakan ini difailkan, perayu telah membayar RM371,000 kepada responden. Tindakan semasa ini timbul apabila responden gagal memenuhi garis masa untuk aplikasi e-dompet tersebut beroperasi dan pelanggaran oleh responden ini menyebabkan penamatan kontrak oleh perayu. Sebagai tambahan kepada tuntutan pelanggaran kontrak, perayu juga telah mendakwa bahawa responden telah salah nyata kepada perayu bahawa responden adalah penyedia perkhidmatan e-dompet yang dilesenkan oleh Bank Negara Malaysia ('BNM') dan bahawa responden mampu mendapatkan kelulusan BNM untuk permohonan e-dompet yang dicadangkan tetapi sebenarnya, responden telah menghubungi

pihak ketiga yang dipanggil MRuncit Commerce Sdn Bhd ('MRuncit') untuk menyediakan perkhidmatan e-dompet tersebut. Dalam tuntutan balas, responden memohon pengisytiharan bahawa penamatan kontrak oleh perayu adalah menyalahi undang-undang dan menuntut kehilangan keuntungan berjumlah RM1,855,000. Mahkamah Tinggi menolak tuntutan perayu dan membenarkan sebahagian daripada tuntutan balas responden berjumlah RM92,750. Mahkamah Tinggi mendapati, antara lain, sebab garis masa tersebut tidak dipenuhi adalah kerana BNM memerlukan maklumat dan dokumen tertentu untuk meluluskan peningkatan saiz e-dompet daripada RM200 kepada RM1,500 dan ia adalah tanggungjawab perayu untuk memberikan maklumat dan dokumen tersebut. Apabila perayu gagal memenuhi tanggungjawab tersebut, perayu tidak boleh berhujah bahawa responden telah melakukan pelanggaran kontrak kerana gagal mematuhi garis masa yang dipersetujui. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Perayu berhujah bahawa ia adalah terma tersirat dalam kontrak bahawa responden bertanggungjawab untuk mendapatkan kelulusan BNM untuk penambahan saiz dompet daripada RM200 kepada RM1,500, dan kegagalan responden untuk mendapatkan kelulusan tersebut merupakan pelanggaran kontrak tersebut. Isu ambang untuk penentuan mahkamah adalah sama ada terma tersirat boleh dibangkitkan secara sah dalam rayuan semasa memandangkan tiada pliding nyata dalam pernyataan tuntutan.

Diputuskan, menolak rayuan dengan kos sebanyak RM30,000 kepada responden:

(1) Kewujudan terma tersirat tidak diplid secara khusus dalam pernyataan tuntutan. Walaupun begitu, mahkamah berpendapat pernyataan tuntutan tersebut mengandungi fakta yang mencukupi untuk menyokong tuntutan pelanggaran kontrak berdasarkan terma tersirat. Sama ada terma tersebut patut dimasukkan ke dalam kontrak sebagai terma tersirat adalah persoalan undang-undang dan oleh itu tiada keperluan untuk perkataan 'terma tersirat' dinyatakan dalam pernyataan tuntutan (lihat perenggan 10(a), 16 & 20).

(2) Bertentangan dengan hujahan perayu, mahkamah mendapati bahawa kewujudan terma tersirat tidak dihujahkan dalam hujahan penggulungan di hadapan Mahkamah Tinggi. Sebagai peraturan umum, perkara undang-undang yang melayakkan pihak yang membangkitkannya untuk penghakiman mesti dibuat dalam perbicaraan, dan jika ia tidak dibuat, ia tidak boleh dibangkitkan pada peringkat rayuan. Walaupun begitu, mahkamah bagaimanapun mempunyai budi bicara yang tidak tergugat untuk membenarkan persoalan undang-undang dibangkitkan buat kali pertama dalam rayuan, jika ia berpandangan bahawa ia adalah demi kepentingan keadilan untuk berbuat demikian. Setelah mempertimbangkan dengan teliti

keseluruhan keadaan kes, mahkamah tidak dapat melihat bagaimana keadilan akan dilaksanakan dengan sebaiknya dengan membenarkan hujah berkenaan terma tersirat dibangkitkan buat kali pertama dalam rayuan ini. Walaupun fakta asas yang menyokong pertikaian kewujudan terma tersirat mungkin telah diplid, ternyata kepada mahkamah bahawa isu asal tidak digubal dengan terma tersirat tersebut dalam fikiran. Atas sebab ini, rayuan telah ditolak oleh mahkamah (lihat perenggan 10(b), 21 & 23–24).

(3) Bagi tujuan undang-undang Malaysia, kedua-dua ujian 'officious bystander' dan ujian keberkesanan komersil atau perniagaan mesti dipenuhi agar sesuatu terma boleh diisyaratkan ke dalam kontrak. Dalam kes ini, mahkamah mendapati wujud terma tersirat bahawa responden bertanggungjawab untuk mendapatkan apa-apa kelulusan kawal selia yang diperlukan untuk permohonan e-dompet dimulakan, termasuk kelulusan untuk penambahan saiz dompet daripada RM200 kepada RM1,500. Mahkamah berpuas hati bahawa, berdasarkan keadaan kes ini, kedua-dua ujian 'officious bystander' dan ujian keberkesanan komersial atau perniagaan telah dipenuhi (lihat perenggan 10(c)(i) & 35–36).

(4) Untuk membatalkan dapatan fakta semasa rayuan, ujian yang terpakai telah mantap: ia mesti ditunjukkan bahawa hakim bicara jelas salah untuk mencapai dapatan fakta tersebut. Adalah tidak mencukupi untuk mahkamah membuat keputusan yang berbeza. Perayu mesti memuaskan hati mahkamah bahawa tiada mahkamah yang munasabah, dalam keadaan yang sama, boleh membuat dapatan sama seperti dapatan hakim bicara berdasarkan keterangan dalam rekod. Berdasarkan fakta kes ini, mahkamah mendapati tidak wujud apa-apa justifikasi untuk mahkamah mengganggu dapatan fakta oleh hakim bicara bahawa perayu telah gagal memberikan dokumen yang diperlukan kepada BNM tepat pada masanya, mengambil kira pertimbangan bahawa terdapat di hadapan mahkamah di bawah keterangan lisan yang tidak dapat disangkal oleh SD4, pengarah MRuncit yang menegaskan bahawa beliau telah memaklumkan kepada perayu tentang keperluan-keperluan BNM. Oleh itu mahkamah bersetuju dengan dapatan hakim bicara bahawa perayu gagal membuktikan bahawa responden telah melanggar kewajipannya di bawah terma tersirat (lihat perenggan 10(c)(ii), 38–39 & 45).]

Cases referred to

Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1982] QB 84, CA (refd)

Appuhamy v Dato' Ajit Singh [1970] 1 MLJ 194, FC (distd)

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 2 AMR 1631; [1994] 3 CLJ 133; [1994] 1 MLRA 201, SC (refd)

Banbury v Bank of Montreal [1918] AC 626, HL (refd)
James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796, HL (refd)
Kembang Serantau Sdn Bhd v Perbadanan Putrajaya [2022] 9 MLJ 243, HC (refd)
Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd [2005] 7 MLJ 216, HC (distd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)
Mentari Sekitar Sdn Bhd v Heritage Property Sdn Bhd [2016] MLJU 1604; [2016] 3 CLJ 382, CA (refd)
Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah [2018] 12 MLJ 49, FC (refd)
Pennsylvania Shipping Co v Compagnie Nationale de Navigation [1936] 2 All ER 1167, KBD (refd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151; [1998] 3 AMR 2901; [1998] 3 CLJ 503; [1998] 1 MLRA 332, FC (refd)
Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor [2010] 4 MLJ 157; [2010] 6 AMR 414; [2010] 8 CLJ 49; [2010] 2 MLRA 328, CA (refd)

Legislation referred to

Rules of the Court of Appeal 1994 r 18(2)

Appeal from: *Bestinet Sdn Bhd v GHL Epayments Sdn Bhd* [2022] MLJU 1397 (High Court, Kuala Lumpur)

R Thayalan Retanavalu (with Vimal Sathiaseelan) (Shukor Baljit & Partners) for the appellant.
Nad Segaram (Shearn Delamore & Co) for the respondent.

Azizul Azmi Adnan JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant plaintiff in this case, Bestinet Sdn Bhd, engaged the respondent defendant, GHL ePayments Sdn Bhd, for the latter to develop an e-wallet application for foreign workers. Bestinet operates a centralised system to manage foreign worker applications into Malaysia. It was common ground that Bestinet's operations involve the department of immigration and that consequently its activities are overseen by the Ministry of Home Affairs (Kementerian Dalam Negeri, frequently referred to by its acronym KDN).

[2] No formal contract was entered into between the parties. The parties had proceeded upon the basis of a quotation issued by GHL ePayments on 5 April 2017. The agreed one-time fee was RM875,000, with separate annual payments for data hosting and maintenance. Bestinet paid RM371,000 to GHL ePayments, pursuant to two invoices issued by the latter to the former.

[3] In their claim, the Bestinet alleged breach of contract and misrepresentation. It claimed, among others, that GHL ePayments had represented to it that:

(a) GHL ePayments was an e-wallet services provider that was licensed by Bank Negara Malaysia, the Malaysian banking and finance industry regulator; and

(b) GHL ePayments was able to obtain the approval of Bank Negara for the proposed e-wallet application.

[4] It transpired that GHL ePayments had engaged a third party called MRuncit Commerce Sdn Bhd to provide the e-wallet services. In its suit, Bestinet claimed that it had not been told of this fact by GHL ePayments.

[5] Bestinet's case was that the parties had agreed to a timeline of the end of January 2018 for the e-wallet application to be operational. It was not in dispute that this timeline was not met. Bestinet terminated the contract between it and GHL ePayments on 1 August 2019.

[6] Bestinet claimed for the return of the RM371,000 paid by it to GHL ePayments. GHL ePayments in turn counterclaimed (among others) for a declaration that the termination of the contract by Bestinet was unlawful and for loss of profits amounting to RM1,855,000.

At the High Court

[7] The High Court dismissed Bestinet's claim. The decision of the High Court may be summarised as follows:

(a) as regards the claim for misrepresentation, the trial judge made a finding of fact that Bestinet had failed to establish that GHL ePayments made the relevant representations to Bestinet prior to the contract coming into existence. The trial judge observed that Bestinet's witnesses at trial only came to be employed by it after the contract was entered into, and thus could not have had personal knowledge regarding any pre-contract representations; and

(b) as regards the claim for breach of contract, the trial judge made a finding of fact that the reason why the timeline was not met was because Bank

Negara was not given certain further information and documents that Bank Negara had required in order to approve the increase in the e-wallet size from RM200 to RM1,500, and that the responsibility for providing these information and documents had lain with Bestinet. It followed that, if Bestinet had failed to provide the information and documents required, it would not be open to it to claim that GHL ePayment had committed a breach of contract by failing to adhere to the agreed timelines.

[8] The High Court also partially allowed GHL ePayments' counterclaim, holding (among others) that the termination by Bestinet was unlawful and that Bestinet was liable to GHL ePayments for the amount of RM92,750.

This appeal

[9] Before us, a single point of appeal was raised in oral arguments: it was contended that it was an implied term of the contract that GHL ePayments was responsible for obtaining Bank Negara approval for the increase in the wallet size from RM200 to RM1,500, and the failure by GHL ePayments to obtain such an approval constituted a breach of the contract.

ANALYSIS AND DECISION

Summary of the decision of this court

[10] After hearing submissions in this case, we dismissed the appeal. The following summarises our decision in this case:

(a) the existence of an implied term was not specifically pleaded in the statement of claim. Despite this, we were of the view that the statement of claim contained sufficient facts to support a claim for breach of contract premised upon an implied term. Whether or not the term ought to be imputed into the contract as an implied term was a question of law and thus there was no requirement for the words 'implied term' to be specified in the statement of claim;

(b) contrary to the submissions of counsel for Bestinet, we found that the existence of an implied term was not argued in closing submissions before the High Court. As a general rule, points of law entitling the party raising them to judgment must be made at trial, and if they are not then made, they cannot be raised at the appeal stage. Despite this, the courts nonetheless have an untrammelled discretion to allow a question of law to be raised for the first time on appeal, if it is of the view that it is in the interests of justice to do so. Having carefully considered the surrounding circumstances of the case, we were unable to discern how justice would

be best served by permitting the argument on implied terms to be raised for the first time in this appeal. For this reason, the appeal ought to be dismissed;

(c) had we arrived at the contrary view, we would have found that:

(i) there existed an implied term that the respondent defendant, GHL ePayment, was responsible to obtain whatever regulatory approvals that were necessary for the e-wallet application to be commissioned, including the approval for the increase in the wallet size from RM200 to RM1,500; and

(ii) on the facts of the case, there did not exist any justification for this court to disturb the finding of fact by the trial judge that the appellant plaintiff, Bestinet, had failed to provide the necessary documents to Bank Negara Malaysia in a timely manner, and that accordingly Bestinet had not established that GHL ePayments had breached its obligations under the implied term.

This meant that, even if this court had come to the finding that it was in the interests of justice to permit the question of implied terms to be raised for the first time on appeal, we would have in any event dismissed the appeal.

[11] Our reasoning is explained in detail in the following paragraphs.

The pleadings before the trial court

[12] The existence of an implied term was not specifically pleaded in the statement of claim. Before us, learned counsel for Bestinet sought to persuade us that implied term was raised in submissions before the court below. We found this not to be the case. At paras 62–87 of the plaintiff's written submissions at the High Court (see pp 806–818 of the record of appeal, encl 8), counsel for the Bestinet sought to argue that the subsequent conduct of the parties could be used to construe the terms of the contract between the parties. Reliance was placed on the case of *Kembang Serantau Sdn Bhd v Perbadanan Putrajaya* [2022] 9 MLJ 243 for this proposition.

[13] We wish to make the following preliminary observations:

(a) first, the submissions of the plaintiff at the High Court failed to appreciate the distinction and interrelationship between the exercise of construing a contract on the one hand, and the very separate exercise of imputing the existence of an implied term on the other. The object of construction is to discern the meaning of the words used by the parties in a contract. For instance, if there is ambiguity in the words used, then the courts may validly apply commercial business sense in order to

ascertain which of the alternative meanings of the words used represented the true intent of the parties. By contrast, an implied term deals not with *ambiguity,* but rather a *lacuna* in the terms expressly agreed between parties;

(b) secondly, while the extrinsic evidence of the circumstances existing before and up to the formation of a contract may validly be taken into account for the purposes of construing the intention of the parties, it is settled law that conduct subsequent to the contract may not be: see *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* [2010] 4 MLJ 157; [2010] 6 AMR 414; [2010] 8 CLJ 49; [2010] 2 MLRA 328 (CA). The reason for this rule, as explained by Lord Reid in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 is that otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later. There are however important qualifications to this rule: first, post-contract extrinsic evidence may be adduced not for the purposes of construing the terms of the contract but to show that a contract existed: per Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 2 AMR 1631; [1994] 3 CLJ 133; [1994] 1 MLRA 201. Secondly, post-contract extrinsic evidence may be adduced for the purposes of establishing estoppel, waiver or acquiescence: *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84. In our respectful view, none of the exceptions applied in the context of the present case to permit the reception of post-contract extrinsic evidence.

[14] Paragraph 85 of the plaintiff's written submissions at the High Court summarises the arguments advanced as to why the GHL ePayment was under an obligation to procure the approval of Bank Negara for the increase in capacity of the e-wallet. These were the testimony of the witnesses of the defendant regarding the back-to-back nature of the arrangement with MRuncit, and the conduct of MRuncit in liaising with Bank Negara in respect of regulatory approvals. Nowhere in the written submissions was there any reference to implied terms or even to, for example, the business efficacy or officious bystander tests that are to be used to infer the existence of an implied term.

Must implied terms be specifically pleaded?

[15] The threshold issue for our determination was whether implied terms could validly be raised in the appeal before us, given that there was no express pleading in the statement of claim.

[16] At the outset, it may be observed that there is no specific rule that expressly requires implied terms to be pleaded. Thus the applicable rule would be that of general application, which is that all material facts must be pleaded so that a defendant will be sufficiently apprised of the case that he or she must answer.

[17] In the case of *Low Keang Guan v Sin Heap Lee-Marubeni Sdn Bhd* [2005] 7 MLJ 216 the plaintiff, who had bought a house from the defendant developer, sought to argue that it was an implied term of the contract of purchase that the land on which the house was located would be a flat piece of land. The High Court dismissed the plaintiff's claim, as the implied term had not been pleaded. Abdul Malik Ishak J had this say on the question of whether implied terms ought to be specifically pleaded:

> There can be no breach of a term that was not incorporated in the sale and purchase agreement. But the plaintiff was adamant and contended that he could rely on an implied term. In response, I have this to say. That the implied term must be pleaded and the particulars set out therein. If the implied term was not pleaded the plaintiff cannot rely on it.

[18] In coming to this decision, the High Court referred to the decision of the Federal Court in *Appuhamy v Dato' Ajit Singh* [1970] 1 MLJ 194. In that case, the plaintiff was a master cutter who had worked for many years at a tailoring establishment that was owned by defendant and by the defendant's father before him. The plaintiff fell ill. For awhile, the plaintiff continued to draw a salary. At some point, the defendant stopped paying his salary and some time later terminated his employment altogether. The plaintiff sued for his back wages. The pleaded defence was that the contract of employment was subject to the implied term that should the plaintiff fall ill, the defendant would be entitled to terminate his services. However, the defendant had also sought to argue that he (the defendant) was not liable to pay the back wages prior to termination. The Federal Court dismissed this argument, on the basis that the implied term — that the plaintiff would only be entitled to a salary had he presented himself fit for work — had not been pleaded. Having pleaded one implied term, the defendant was not entitled to advance an argument on another.

[19] We are of the view that both the preceding cases are distinguishable. In those two cases, the terms that were argued in submissions to exist had not been pleaded. By contrast, in the present case, Bestinet had pleaded in para 42 the precise term that it contended bound GHL ePayments; it was just that Bestinet had not specified whether this was an express or implied term. There thus could not be said to arise any doubt in the mind of GHL ePayments as to the case that it had to answer.

[20] In our considered view, the statement of claim contained sufficient facts to support a claim for breach of contract premised upon an implied term. The contended breach of contract was set out in para 42 of the statement of claim, which made it clear that the plaintiff was of the position that it was a term of the contract that the defendant was to obtain the approval for Bank Negara for the increase in the e-wallet size. Whether or not that term was expressly incorporated into the contract (it was not) was a matter of evidence, and whether or not the term ought to be imputed into the contract as an implied term was a question of law. Neither law nor evidence need be pleaded.

Can a question of law be raised for the first time on appeal?

[21] The present position may be summed up as follows: the existence of an implied term was not specifically pleaded in the statement of claim, but the material facts supporting such a contention have been adequately set out in the plaint. Contrary to the submissions of counsel for Bestinet, we found that the existence of an implied term was not argued in closing submissions before the High Court. The question that now arises is whether Bestinet would be permitted to raise arguments relating to the existence of an implied term for the first time in the appeal before this court.

[22] We observe that there is a specific reference to the existence of an implied term in para 2 of the memorandum of appeal.

[23] The applicable principles are as follows: as a general rule, points of law entitling the party raising them to judgment must be made at trial, and if they are not then made, they cannot be raised at the appeal stage: *Banbury v Bank of Montreal* [1918] AC 626 (HL). The courts nonetheless have an untrammelled discretion to allow a question of law to be raised for the first time on appeal, as an exception to this general rule. The court may allow a new point of law to be raised by the parties for the first time before it where the interest of justice so require: *Pengusaha, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v Badrul Zaman bin PS Md Zakariah* [2018] 12 MLJ 49 (FC). The question of whether the interests of justice are met depends on the peculiar facts of each case: *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 (CA). Two clear exceptions to the general rule are where the new point of law relates to illegality or jurisdiction: *Mentari Sekitar Sdn Bhd v Heritage Property Sdn Bhd* [2016] MLJU 1604; [2016] 3 CLJ 382 (CA), but the categories of cases are not closed: *Luggage Distributors*. A party seeking to raise a new point of law in appeal must first seek leave of the Court of Appeal if that new point has not been set out in the memorandum of appeal: r 18(2) of the Rules of the Court of Appeal 1994.

[24] Did the interests of justice favour Bestinet in the circumstances of the present case? We were not persuaded. Having made the submission that the existence of an implied had been argued before the High Court, it thus followed that counsel for Bestinet offered no arguments as to how it would be in the interests of justice for the discretion of this court to be exercised in favour of permitting the implied term point to be raised here. We have carefully considered the surrounding circumstances of the case, and were unable to discern how justice would be best served by permitting the argument on implied terms to be raised for the first time in the appeal. Even though the basic facts supporting the contention of the existence of an implied term may have been pleaded, it appeared to us that the original plaint had not been drafted with implied terms in mind. This conclusion is supported by the absence of a specific reference to the expression 'implied terms', 'syarat tersirat' or 'terma tersirat' in the statement of claim. The fact that — contrary to the assertions of counsel for Bestinet — the existence of an implied term was never raised in the after-trial submissions fortified our view that it never formed any part of the case of the plaintiff from the beginning.

[25] It was only after the finding of fact was made by the trial judge that the fact of representations was never proven by the plaintiff that the issue of implied terms came to the fore.

[26] There were two pleaded causes of action in this case: a claim for tortious misrepresentation, and for breach of contract. A representation may operate pre-contract, in that it induces a party to enter into contractual relations. A claim for breach of pre-contract representation is a tortious cause of action, the remedy of which is rescission of the contract. Thus, where a party is induced to enter into a contract on the basis of a representation, and the representation that has subsequently been established as false had not been included into the terms of the contract, that party's remedy lies only for actionable misrepresentation in tort. The measure of damages in such a case would be to put the parties into the position had the contract not been entered into.

[27] If the representation has been incorporated into the contract, then there is authority for the proposition that the claim may only be sustained in an action on the contract. In *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, it was held that the common law cause of action for misrepresentation merged into a contractual right of action once the representations forming the basis of the complaint were incorporated into the contract subsequently entered between the parties. Depending on whether or not the misrepresentation constituted a fundamental breach, the plaintiff may elect either to repudiate or rescind the contract, or to claim for damages. If the plaintiff elects for the latter, appropriate measure of damages would be to put

the plaintiff in the position he would have been in had the representation been true.

[28] In this case, the alleged representations had not been incorporated into the terms of the contract, which meant that Bestinet could only have proceeded on the tortious cause of action for misrepresentation to seek rescission, unless it could somehow be proven that it was a term of the contract that the responsibility to procure all necessary regulatory approvals lay with GHL ePayment. At trial, the case conducted on behalf of Bestinet attempted to refer to the post-contractual conduct of the parties to establish that indeed this responsibility had been assumed by MRuncit on behalf of GHL ePayments. The problem with this approach was twofold: as explained, as a general rule, post-contract conduct cannot be used for the purposes of construing a term of the contract. Secondly and in any event, there was no express term in the contract to construe. The words in a contract are to be given their ordinary meaning, and where the words support more than one meaning, the courts are permitted to examine the surrounding circumstances up to the time of contract to discern what reasonable persons in the position of the parties would have meant by the words used. Bestinet could possibly have relied upon estoppel, which is an established exception to the rule excluding post-contract extrinsic evidence (see *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84, a decision of Denning MR and which was quoted in the case of *Kembang Serantau Sdn Bhd v Perbadanan Putrajaya* [2022] 9 MLJ 243 relied upon by Bestinet at the court below), although arguably in such a case the object of the exercise is not so much to *construe* the meaning of the contract, but to show that the parties had acted in a certain way to make it inequitable for one of the parties to rely on another meaning of the disputed words in the contract. However in this case, estoppel was not pleaded either.

[29] It was thus clear that the only way in which Bestinet could possibly succeed was if it could establish that, even though the responsibility to obtain regulatory approval was not spelt out in the contract, it nonetheless formed part of the terms of the contract by necessary implication. The trouble was, this argument was not advanced in the court below, even if the basic facts supporting such a contention appear to have been adequately pleaded.

[30] In the course of oral arguments, counsel for Bestinet was pointedly asked the question by this court if the point had been argued before the High Court. The answer was in the affirmative, but as we have explained, our subsequent examination of the record of appeal revealed what can only be described as a distressing lack of candour on the part of counsel.

[31] The manner in which the point of law was sought to be raised before us fortified our view that the interest of justice did not lie in permitting the new point of law to be raised in this court.

[32] That would have been sufficient to have disposed of the entire appeal. We have nonetheless, in the interests of completeness, proceeded to consider whether such a term can be imputed into the contract and if so, whether there has been breach by GHL ePayment of such a term.

Should the implied term be imputed into the contract?

[33] Although the objects of the exercise of imputing the existence of an implied term on the one hand, and of the exercise of contractual construction on the other, are both aimed at ascertaining the intention of the parties when they had entered into the contract, the process by which the court undertakes each exercise is quite different.

[34] The following passages from the Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; [1998] 3 AMR 2901; [1998] 3 CLJ 503; [1998] 1 MLRA 332 outline the tests to be applied by a court in imputing an implied term by inference from surrounding circumstances:

> Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'.
>
> The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137, that in regard to an implied term, it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for ten years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the ten year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for ten years to

Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as of course, so and so will happen, we did not trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, *Lord Wilberforce in Liverpool City Council v Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. *Lord Simon of Glaisdale in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained.

[35] Thus, for the purposes of Malaysian law, both the 'officious bystander' and commercial or business efficacy tests must be satisfied in order for a term to be implied into a contract.

[36] We are satisfied that, based on the circumstances of the present case, that both these tests had been satisfied. The engagement of GHL ePayment was for the latter to provide the e-wallet application which was to be offered to foreign workers whose applications for work permits were under the management of Bestinet. It would stand to good commercial sense that it was the responsibility of GHL ePayment to obtain whatever regulatory approvals that were necessary for the e-wallet application to be commissioned, including the approval for the increase in the wallet size. Similarly, if the parties had been asked by an officious bystander at the time the quotation was issued as to whose responsibility it was to obtain the relevant regulatory approvals, we were satisfied that they would have both answered that it was GHL ePayments's.

[37] The evidence before the High Court was that the regulatory approval process was one that was driven primarily by the staff of MRuncit. We are of the view that, because of the back-to-back arrangement between GHL ePayment and MRuncit, the latter had undertaken the work to obtain regulatory

approval for and on behalf of the former. Thus, just because MRuncit had in fact undertaken the work does not absolve GHL ePayments of its contractual obligations to Bestinet.

Was there breach of the implied term?

[38] It is important to appreciate that the trial judge had made a finding of fact that the reason why Bank Negara approval had not been obtained within the stipulated timeline was due to the Bestinet's own failure to provide the information and documents that had been required by Bank Negara. This finding of fact, if correctly made, constituted a full answer to the contention of breach of contract by Bestinet. Put another way, even if Bestinet has successfully established that there was an implied term that GHL ePayments was under an obligation to obtain the approval of Bank Negara for the e-wallet application, Bestinet would still have to prove that GHL ePayments had breached this implied term, and to do so, Bestinet must satisfy this court that the requirements for overturning a finding of fact on appeal have been satisfied.

[39] The applicable test is well-settled: it must be shown that the trial judge was plainly wrong to arrive at that finding of fact. It would simply not be enough if this court, sitting in appeal, would have come to a different finding. Bestinet must satisfy us that no reasonable court, similarly circumstanced, could have arrived at the finding of the trial judge based on the evidence on record: see *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428.

[40] The evidence in this case showed that there was a series of correspondence between MRuncit and Bank Negara regarding the application for approval to increase the wallet size from RM200 to RM1,500. The central plank of the case for Bestinet was that it had not been informed of the requirement from Bank Negara for further documents, specifically in respect of the letter from Bank Negara to MRuncit dated 29 March 2018. If it had not been told of the request for information — argued counsel — then how could it be faulted for not having responded with the requisite information or documents? It was submitted that the learned High Court judge was plainly wrong when he made the following conclusion in his grounds of judgment:

> 93. Therefore, I find that it is not correct that the plaintiff blames the failure, if any, for the implementation of Phase 2 on the defendant. I opine that the contemporaneous documents show that it was the Plaintiff who had failed to ensure that the Ministry of Home Affairs and the Immigration Department of Malaysia to provide the said authorization letter to MRuncit.
>
> 94. Even if I were to take the Plaintiff's case to its highest, the said obligation should lie with MRuncit. Even under those circumstances, the evidence of MRuncit's representatives indicates to me that they had informed the requirements of Bank

Negara Malaysia many times to the Plaintiff's representatives. It was only the Plaintiff who could have obtained the approvals for their business plans from the relevant authorities.

[41] In the Bank Negara letter dated 29 March 2018, it had requested MRuncit to provide an approval letter from the relevant authority — which was taken to mean KDN or the Ministry of Home Affairs — on the proposal to implement an electronic identification functionality for foreign workers under the e-wallet application. The material portion of the letter is reproduced below:

Encik Aaron Lee
Ketua Pengarah Eksekutif
MRuncit Commerce Sdn. Bhd.
DF2-15-03 (Unit 5), Tower Persoft
6B Persiaran Tropicana
Tropicana Golf & Country Resort
47410 Petaling Jaya
Selangor Darul Ehsan

Tuan,

MCash Bestlala Mobile Application

We refer to MRuncit Commerce Sdn. Bhd. (MRuncit)'s letters dated 2 November 2017 and 27 February 2018 and Bank Negara Malaysia (BNM)'s letters to MRuncit dated 15 August 2017 and 13 February 2018 on the above.

2. Based on BNM's review of the documents and information provided by MRuncit on 27 February 2018, MRuncit's submission is inadequate for BNM to consider the said proposal as it did not provide the following:

i. An attestation of the compliance status of the approval conditions by an internal audit function as stated in BNM's letter dated 15 August 2017; and

ii. An approval letter granted by the relevant authority on its proposal to implement an electronic ID functionality for foreign workers under the MCash Bestlala mobile application.

3. Pending the above submission, MRuncit's proposal on the variation of its existing MCash mobile application known as MCash Bestlala mobile application will not be processed further. MRuncit is reminded to adhere to the approval conditions stipulated in BNM's letters dated 17 January 2013 and 15 August 2017 and not to offer the proposed service without prior approval from BNM.

Sekian, harap maklum.

[42] Before us, counsel for Bestinet sought to argue that the requirement set out in para 2(ii) of the letter was never communicated to Bestinet. Indeed, there was no documentary evidence adduced during the trial that established that the contents of this 29 March 2018 letter had been communicated to Bestinet.

[43] There was, however, oral testimony to this effect. Encik Imran bin Shafie ('SD4'), who was a director and the Chief Commercial Officer of Mruncit, explained the circumstances surrounding the application to Bank Negara in his answer to question 6 of his witness statement. According to him, following receipt of the Bank Negara letter of 29 March 2018, he had responded to Bank Negara with the supporting documents relating to para 2(i) of the letter, and had informed Bank Negara that he was still awaiting the approval letter sought in para 2(ii). Crucially, En Imran testified that he had informed Bestinet regarding the requirement of Bank Negara for the approval letter, and that he had followed up with En Masri Mohd (theproject manager at Bestinet) every fortnight on the progress of the approval letter. The relevant portion of SD4's witness statement stated as follows:

> Namun begitu, pada 29.3.2018 [CBD Jilid 2 ms 51 dan ITB ms 195], BNM membalas dan berpendapat bahawa dokumen-dokumen dan maklumat yang diberikan tidak mencukupi dan tidak memadai bagi mereka untuk mengambil permohonan itu dalam pertimbangan. Mereka secara spesifik meminta, antara lain, surat kelulusan yang diberikan oleh pihak berkuasa yang berkenaan mengenai cadangan untuk melaksanakan fungsi ID elektronik bagi pekerja asing di bawah aplikasi mudah alih MCash BestLala.
>
> Melalui surat bertarikh 13.4.2018 [CBD Jilid 2 ms 52–63 dan ITB ms 196–207], kami membalas pada syarat pertama dan melampirkannya dengan dokumen sokongan. Dalam surat yang sama, kami memaklumkan BNM bahawa MRuncit masih menunggu Bestinet untuk mengemukakan surat pemberikuasaan yang dijangka akan didapati pada Mei 2018 dari pihak berkuasa berkenaan. Tanpa surat pemberikuasaan, MCash Bestlala tidak akan dibenarkan untuk pergi live/ dilancarkan.
>
> *Saya telah menyalinkan dan memaklumkan Bestinet tentang permohonan BNM serta meminta atau menyusul dengan Masri dua minggu sekali tentang surat pemberikuasaan dari Bestinet* melalui WhatsApp atau panggilan telefon pada 2018. Namun begitu, Masri membalas saya bahawa dia memerlukan masa untuk menyediakan surat pemberikuasaan sehingga saya menerima e-mel daripada Bank Negara Malaysia. (Emphasis added.)

[44] Under cross-examination, En Imran was steadfast that he had informed Bestinet of the relevant requirements. The notes of evidence recorded the following exchange:

> PP: Sekarang, saya pergi balik kepada kesemua surat ini yang saya rujuk, daripada muka surat; ini adalah surat 184, 13 Februari ini, di surat pertama ini, 178, kemudian ada jawapan daripada Bank Negara Malaysia, ini adalah surat 13.2.2018, saya tunjuk perlahan sedikit, saya nak tanya soalan kemudian surat 27 Februari ini, kemudian surat dari Bank Negara Malaysia 29 Mac, kemudian jawapan 13.4.2018. Kesemua surat-surat ini jika dilihat daripada surat-surat ini, tidak disalinkan kepada Bestinet. Setuju? Ya, ditandatangan, tidak disalinkan.
>
> SD4: Tapi kami ada memberitahu kepada Bestinet.

[45] The trial judge in this case accepted the testimony of SD4. En Masri was not called to refute SD4's version of events. In our considered view, the issue turned upon the credibility of the testimony of En Imran bin Shafie, which the trial judge was well placed to undertake. He possessed the audio visual advantage of evaluating the viva voce testimony of the witnesses. We do not believe that there existed good grounds to disturb the finding of fact by the trial judge, taking into consideration that there was before the court below oral testimony of SD4 to the effect that he had informed Bestinet of Bank Negara's requirements. The trial judge cannot be said to have been plainly wrong by reason of having accepted the testimony of SD4.

[46] For these reasons, we dismissed the entirety of the appeal, with costs of RM30,000 to GHL ePayments.

Appeal dismissed with costs of RM30,000 to respondent.

Reported by Dzulqarnain Ab Fatar